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No. 95-576

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CHRISTINE WILLIAMS and CITIZENS FOR LIFE,

Petitioners,

vs.

PLANNED PARENTHOOD SHASTA-DIABLO, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the California Supreme Court after remand in this case conforms to *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994).

PARTIES TO THE PROCEEDINGS

Respondent Planned Parenthood Shasta-Diablo, Inc., is a California non-profit corporation. It has no parent company or subsidiaries. No other corporations are parties to this action. This statement is submitted pursuant to Rule 29.1.

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Respondent Planned Parenthood Shasta-Diablo, Inc. ("Planned Parenthood"), respectfully submits this opposition to the petition for writ of certiorari to the Supreme Court of the State of California.

INTRODUCTION

In its first opinion in this case, the California Supreme Court upheld an injunction imposing a place restriction on anti-abortion picketing under what was then the settled test for evaluating content-neutral time, place and manner restrictions on public forum speech, *i.e.*, whether the restriction was narrowly tailored to advance a significant governmental interest. (*See, e.g., Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983)). Shortly thereafter, this Court issued its decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), holding that the differences between a generally applicable statute and an injunction warranted a "somewhat more stringent application of general First Amendment principles" in the injunction context. (114 S. Ct. at 2524). It concluded that the appropriate test was "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (114 S. Ct. at 2525). This Court's subsequent order remanding this case stated that "[t]he judgment is vacated and the case is remanded to the Supreme Court of California for further consideration in light of *Madsen v. Women's Health Center, Inc.*"

The duty of the California Supreme Court upon remand was thus to carefully review its decision and determine whether a different result was warranted in light of *Madsen*. It did so. It meticulously reviewed the facts of *Madsen* and the Court's application of the new constitutional standard to those facts. It then fully and fairly reconsidered its decision and concluded that the place restriction was consistent with *Madsen*.

Petitioners have presented no basis for review of that decision. Their petition for certiorari only reargues the facts and inferences found by the state courts and presents no substantial constitutional question.

RESPONSE TO STATEMENT OF THE CASE

A. Factual Background

Planned Parenthood operates a family planning clinic in Vallejo, California. (App. 2a). The clinic provides a range of family planning services, including abortions. (*Id.*).

The clinic is in a single-story office building that Planned Parenthood shares with a tax service. (App. 70a, 42a). A parking lot adjoins the clinic on one side and to the rear of the building; the lot is for the exclusive use of Planned Parenthood and the tax service. (App. 70a, 46a). There is a short, narrow sidewalk in front of the office building, punctuated by two driveway entrances. (App. 2a, 42a).

In March 1990, petitioners[1] started to gather at the clinic, primarily on Thursdays when abortions were performed, and began a pattern of harassment and intimidation of Planned Parenthood's patients and staff. (App. 2a-3a, 42a-43a). The number of protesters varied from a handful to over 100. (App. 2a-3a, 43a).

Petitioners picketed throughout the parking areas, driveways and sidewalk in front of the office building, carrying signs protesting abortion. (App. 3a, 71a). They obstructed cars entering the driveway into the clinic's parking lot. (App. 3a, 46a).

1. Petitioners are Christine Williams and Solano Citizens For Life, an unincorporated association.

As cars attempted to turn into the clinic driveway, petitioners would surround them and try to pass literature through the windows before they could be rolled up. (App. 3a, 71a). They followed patients to and from their cars or to the bus stop, attempting to hand them literature and replicas of plastic fetuses. (App. 42a, 3a). They also accosted, surrounded or followed patients on the sidewalk. (App. 71a, 83a). Petitioners stationed "counselors" in the parking area who pressed literature and plastic fetuses on those entering the clinic. (App. 3a). On one occasion, they handed a plastic fetus to a small child after his mother had refused to take it herself. (App. 83a). They often stood directly in front of the doorway to the clinic, making it difficult to enter or exit. (App. 42a, 46a).

Petitioners' activities caused some of the patients seeking medical care or counseling at the clinic to become emotionally distraught. (App. 43a, 71a, 83a). Planned Parenthood was forced to escort patients to ensure their unimpeded passage to the door of the clinic. (App. 3a-4a, 42a, 46a). On at least one occasion, staff members had to disperse a group of pickets who were surrounding a patient on the sidewalk. (App. 71a, 83a).

B. The Trial Court Decision

In August 1990, the trial court issued a temporary restraining order prohibiting petitioners from blocking or harassing any person coming into or out of the clinic and restricting their picketing to the sidewalk in front of the clinic. (App. 64a-66a). After a hearing, the trial court issued a preliminary injunction that restricted the number of pickets on the sidewalk to four and required that at least two of these pickets remain ten feet apart from the other two. (App. 67a-68a).

At trial on the permanent injunction, testimony was introduced concerning petitioners' harassment and intimidation

of patients and staff at the clinic. (App. 72a). There was also testimony that police enforcement was necessary because pickets on the sidewalk had violated the terms of the preliminary injunction. (App. 3a, 72a).

Following trial, the court made findings, based on the uncontradicted evidence, that petitioners (1) confronted and intimidated women seeking Planned Parenthood's services; (2) interfered with or obstructed entrance to and from the clinic; (3) pursued patients to their cars or public transportation in an effort to distribute literature or plastic fetuses; (4) conducted these activities on a weekly basis, with as many as 100 people involved; and (5) caused some of the women seeking counseling or services from Planned Parenthood to become emotionally distraught. (App. 42a-43a).

In August 1991, the trial court entered judgment for Planned Parenthood, issuing a permanent injunction restricting petitioners' picketing activities to the sidewalk immediately across the street from the clinic. *(Id.)*.

C. The California Supreme Court Decision

The California Supreme Court upheld the exclusion of petitioners from the sidewalk directly in front of the clinic. Conducting an independent review of the record pursuant to *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 489-511 (1984), the court concluded that the trial court's findings should not be disturbed "under any standard." (App. 70a, n.1). It held that those findings supported the sidewalk restriction as necessary to protect the health and safety of clinic patients (App. 82a-84a).

After that decision was published, this Court issued its decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), holding that the test to be applied in evaluating an

injunction should be "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (*Id.* at p. 2525). Petitioners then filed a petition for certiorari in this case, which the Court granted, ordering the decision to be vacated and reconsidered in light of the *Madsen* decision.

Following further briefing and oral argument, the California Supreme Court thoroughly reconsidered the matter and concluded that the injunction was valid under the new standard set forth in *Madsen*. (App. 19a). It found that *Madsen* strongly supported the conclusion that the buffer zone in this case was amply justified by at least two significant governmental interests, the interest in protecting the health and safety of clinic patients, and the interest in protecting unfettered access to the clinic and ensuring that protesters did not block traffic. (App. 14a-15a). It concluded that the state's recognized interest in protecting the "health and well-being of the patients" acknowledged in *Madsen* (114 S. Ct. at 2528) justified the limited buffer zone in light of the physical confrontations and consequent heightened stress and anxiety to which patients were being subjected moments before receiving medical treatment, including surgery. (App. 16a). It further found that the buffer zone was justified as a means of protecting access based upon the limited confines around the clinic in light of evidence that petitioners had, in fact, interfered with and obstructed entrance to and exit from the clinic and had failed to comply with a more limited preliminary injunction. (App. 14a).

The California Supreme Court also determined that the buffer zone burdened no more speech than necessary to preserve these governmental interests, and hence met the heightened standard articulated in *Madsen*. (App. 17a-18a). It based this conclusion on the physical layout of the clinic and its environs, and evidence that the protesters had physically interfered with

access to the clinic, blocked passage, and followed and surrounded patients, causing heightened stress and anxiety. (App. 17a-18a). It observed that a less restrictive alternative — limiting the number of pickets on the sidewalk — had been tried unsuccessfully by the trial court. (App. 17a). It found that the site across the street was in plain view of persons entering and leaving the clinic and afforded petitioners a reasonable vantage point from which to communicate their message without physically intimidating patients. (App. 18a-19a).

REASONS FOR DENYING THE WRIT

I.

THE STATE SUPREME COURT'S DECISION WAS BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD.

Petitioners argue that the California Supreme Court relied on inference rather than evidence in upholding the injunction. Petitioners support that argument by isolating and quoting a single phrase from the court's opinion[2] and studiously ignoring the balance of the record, which contains abundant evidence (not inference) to support the court's decision.[3] The decision did not rest on the hypothetical possibility that one or two protesters might block the narrow sidewalk, although such an inference was

2. Petitioners rely on the following sentence: "The court noted that, given the 'close physical confines' of the area around the clinic, 'even one or two picketers could effectively block pedestrian or vehicular traffic.' " (Petition at 9).

3. Moreover, petitioners are in a poor position to argue about what was and was not in the record before the trial court in that they chose not to request that all of the proceedings below be transcribed and included in the record on appeal. (*See* App. 47a, n.1).

fully supported by the evidence (showing that the sidewalks are only four to six feet wide). (App. 53a, n.3). Rather, the court relied on a number of facts that proved that petitioners' activities were interfering with patients' unfettered access to the clinic in ways very similar to those in *Madsen*.[4]

The sidewalk in front of the clinic is described by witnesses as "small" — a description confirmed by the photographs (App. 53a) — and is punctuated by two driveway entrances into the clinic parking lot. (App. 17a). The picketers' "standard procedure" was to have two to eight picketers walk along the sidewalk and across the driveways in front of the clinic carrying large signs. (App. 53a). Witnesses testified that picketers would walk so slowly across the driveways "that people [in their cars] have to sit in the street and wait to turn for a long time, or a lot of clients turn into the adjacent building to go through into the parking lot." (App. 53a). Picketers would approach the cars and attempt to pass literature through the windows, even as they were being rolled up. (App. 2a-3a, 71a). One of *petitioners'* witnesses testified that picketing and "counseling" activities on the sidewalk were impractical and potentially dangerous because they "would impede traffic, would probably cause traffic

4. Contrary to petitioners' implication, *Madsen* does not require evidence that access has, in fact, been blocked in order to justify an injunction. Indeed, there was no evidence in *Madsen* that the protesters had ever completely blocked ingress to and egress from the clinic. Rather, the Court made it clear that the 36-foot buffer zone was predicated on the interest in ensuring free and unfettered access by patients and staff:

> This [36-foot] speech-free buffer zone requires that petitioners move to the other side of Dixie Way and away from the driveway of the clinic, where the state court found that they repeatedly had interfered with the *free access* of patients and staff.

(114 S. Ct. at 2526) (emphasis added).

accidents." (App. 3a). Petitioners also stationed two "counselors" near the entrance to the clinic. (App. 46a). The "counselors" would approach patients as they attempted to enter the clinic, offering them literature and plastic fetuses. (*Id.*). They often stood directly in front of the clinic doorway, making it difficult to enter or exit. (*Id.*). Planned Parenthood was forced to use escorts to accompany its clients through the picket lines and past the picketers in the parking lot. (App. 42a). In one instance, the escorts dispersed a group of protesters encircling an emotionally distraught patient on the sidewalk. (App. 71a).

It was on the basis of this *evidence,* not inference, that the trial court found that petitioners interfered with and obstructed entrance to and egress from the clinic.[5] (App. 42a). Based upon an independent review of the evidence in the record (App. 70a), the California Supreme Court concluded that "petitioners had significantly blocked driveways, surrounded patients' cars, and stalked and obstructed patients walking to and from their cars and public transportation, and had thereby significantly 'interfered' with clinic access." (App. 15a-16a).

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5. It was also on the basis of evidence (not inference as petitioners imply), that the California Supreme Court found that the protesters had violated the preliminary injunction. One witness testified that the demonstrators followed the preliminary injunction "usually, except for picketers." (App. 3a, 72a, n.2). This testimony was corroborated by that of the clinic director, who testified that she had been forced to call the police to enforce the preliminary injunction, " 'to hand it out to people who were on the sidewalk and were about to break the rules' or breaking the rules." (App. 3a).

II.

SPEECH ACTIVITIES DO NOT BECOME INSULATED FROM RESTRICTION MERELY BECAUSE THEY ARE CONDUCTED IN A PUBLIC FORUM.

Petitioners create a false dichotomy between conduct that "immediately and inescapably invades a medical facility, thus putting patients at risk" and speech activity that is "confined to a public forum." (Petition at 9-11). The two are not mutually exclusive.

When activities in a public forum occur directly outside a medical facility and the speech and conduct targets patients about to undergo surgical procedures, then such activity, though technically "confined to a public forum," will also "put patients as risk." Protest activity need not literally invade the clinic in order to cause dangerous physical effects on the patients. Petitioners thus focus on the wrong issue. The question is not whether the speech activities "invade" a medical facility. The question is whether the activity is fundamentally incompatible with the "nature of [the] place, [and the] pattern of its normal activities." *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972).

This Court has relied on this incompatibility principle to sustain regulation of public forum speech activities outside courthouses (*Cox v. Louisiana,* 379 U.S. 559 (1965)), polling places (*Burson v. Freeman,* 504 U.S. 191 (1992)), and homes (*Frisby v. Schultz,* 487 U.S. 474 (1988)). In none of these cases was there evidence that the speech activities had literally invaded the facility, or that the noise from those activities was even audible in the facility.[6] Rather, it was the appropriateness of those

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6. *See, e.g., Frisby,* 487 U.S. at 476 ("The picketing was generally

(Cont'd)

activities *near* the facility in light of the special characteristics of the facility that justified the restrictions on speech activity.

Just as the special characteristics of the school, home, courthouse or polling place environment may be considered in assessing restrictions on protest activity, the special characteristics of a medical facility can and should be considered in evaluating restrictions on targeted picketing of such a facility. Here, petitioners' activities were fundamentally incompatible with the normal activities of a medical clinic. The principal targets of petitioners' activities were medical patients and their conduct caused some of these patients to become emotionally distraught, and thereby exacerbated the anxiety, fear or apprehension that ordinarily accompanies any invasive medical procedure.[7] (App. 46a, 16a, 82a-83a).

Moreover, the conduct here was occurring not merely *near*

(Cont'd)
orderly and peaceful; the town never had occasion to invoke any of its various ordinances prohibiting obstruction of streets, loud and unnecessary noises, or disorderly conduct.").

7. Petitioners argue that there was no direct evidence that any patients' health or safety was *actually* jeopardized, but that the court "simply found" that some women had become emotionally distraught. (Petition at 11). It is apparently petitioners' position that protection of the health and safety of medical patients cannot support injunctive relief absent evidence of "adverse physical effects" on at least one patient. (Petition at 11). Such a rule would be barbaric, and has no support in the case law. This Court has never held that actual harm to particular individuals or to the administration or operation of a particular facility, such as a school or court, is the *sine qua non* of content-neutral restrictions on speech activity. Moreover, this Court explicitly recognized in *Madsen* that protection of both the psychological and the physical well-being of patients "held 'captive' by medical circumstance" were among the governmental interests that could justify an appropriately tailored injunction restricting speech activities. (114 S. Ct. at 2526). Direct evidence of physical harm to patients was not required to sustain the restriction under *Madsen*.

the clinic but at the only public access point: the driveway and sidewalk entrances to the clinic property. Hence, patients attempting to enter or leave the clinic had no choice but to submit to petitioners' offensive conduct.[8] As *Frisby* illustrated, the state's interest in safeguarding individual privacy is particularly strong in instances in which the listener cannot readily avoid the message. "[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan v. United States Post Office Department*, 397 U.S. 728, 736 (1970). The "First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Frisby v. Schultz*, 487 U.S. at 474.[9]

8. In *Madsen*, the Court pointed out the distinction between "the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places." (114 S. Ct. at 2527). It quoted *Frisby v. Schultz* for the proposition that the " 'type of focused picketing prohibited by [the state court injunction] is *fundamentally different* from more generally directed means of communications.' " *Id.*, *quoting Frisby v. Schultz*, 487 U.S. at 486 (emphasis added). It noted that "[h]ere the picketing is directed primarily at patients and staff of the clinic."

9. In *Madsen*, this Court implicitly acknowledged the significance of the captive audience doctrine in upholding the noise restrictions while striking the "images observable" restriction. It reasoned that the noise restrictions burdened no more speech than necessary to ensure the health and well-being of clinic patients because the "First Amendment [did] not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." (114 S. Ct. at 2528). The same was not true, however, of the "images observable" provision. The Court stated that,

> if the blanket ban on "images observable" was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by "images observable" inside the clinic

(Cont'd)

Petitioners cite a number of cases to support the proposition that confrontational or unwelcome speech deserves protection. However, most of these cases involved content-based restrictions on speech in a public forum and in none of the cases was the appropriateness of the place and manner of the speech activity in light of the characteristics of a particular facility or the condition of the target audience a matter of particular concern.[10] Here, by

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(Cont'd)

> would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic.

(114 S. Ct. at 2529). Here patients entering and leaving the clinic could not avoid unwanted contact with petitioners except by blocking both their ears and their eyes, which was clearly not a reasonable alternative under the circumstances. In order to obtain access to the medical facility, they had to submit to petitioners' intimidating activities.

10. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (Statute prohibiting display of certain signs within 500 feet of foreign embassies was "justified *only* by the content of speech. Respondents . . . do not point to . . . congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies.") (emphasis in original); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (Invalidating statutory prohibition against paid circulars as content-based restriction on core political speech subject to most exacting scrutiny); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (First Amendment precluded recovery of damages against class of people participating in boycott of white-owned businesses); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (Statute prohibiting solicitation for any religious or charitable cause without prior approval of secretary of public welfare facially violative of First Amendment); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (Prohibition of all picketing of businesses with intent to influence others not to patronize or accept employment violated First Amendment on its face); *Lovell v. Griffin*, 303 U.S. 444 (1938) (Ordinance prohibiting distribution of circulars, handbooks, advertising or literature without a permit facially invalid as striking "at the very foundation of the freedom of the press by subjecting it to license and censorship.").

contrast, the restrictions on speech activity were content-neutral and were justified based on the interference with access and the impact of the conduct on the health and safety of clinic patients. They were not designed to shield patients from the emotional impact generated by the content of petitioners' message.[11] Petitioners remain free to communicate their message — via slogans, chants, songs, signs, banners, symbols, or any other form of communication — so long as they do not do so on the narrow sidewalk or driveways fronting the clinic. The restriction is on the place and manner of petitioners' activities, not the content of their message, precisely because it was the place and manner of communication that interfered with access and threatened the health and safety of clinic patients.

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11. *Madsen* did not suggest, as petitioners imply, that the avoidance of emotional trauma generated by speech activity could never justify restrictions on speech. Rather, the Court cited the well-established proposition that "[a]s a general matter, . . . in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." (114 S. Ct. at 2529, citations and internal quotation marks omitted). The concern underlying this proposition is that the content of speech not be restricted solely because of the possibility that it might provoke an emotional reaction. This is a far cry from petitioners' apparent position that physical intimidation and harassment of patients as they attempt to enter a medical clinic cannot be subjected to content-neutral restrictions. It was the place and manner in which petitioners were delivering their message — immediately outside a medical clinic by impeding, surrounding, following and harassing patients — not the content of that message, that justified the restriction in this case.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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